

Ky. Op. Atty. Gen. 09-OMD-081, 2009 WL 1546077 (Ky.A.G.)

Office of the Attorney General
Commonwealth of Kentucky

09-OMD-081

May 27, 2009

In re: Barbara M. Castleberry/Eastern Rockcastle Water Association, Inc.

Summary: Because Eastern Rockcastle Water Association, Inc. is a private, nonstock, nonprofit corporation organized under KRS Chapter 273, ERWA cannot properly be characterized as a “public agency” within the meaning of [KRS 61.805\(2\)](#); accordingly, ERWA is not required to comply with provisions of the Open Meetings Act. OAG 78-395 is controlling on the facts presented.

Open Meetings Decision

At issue in this appeal is whether Eastern Rockcastle Water Association, Inc. violated the Kentucky Open Meetings Act on April 21, 2009, in prohibiting Barbara M. Castleberry and “several other members of the public from attending the regular monthly Board meeting of the [ERWA].” More specifically, the dispositive question presented is whether ERWA is a “public agency” for purposes of the Open Meetings Act. Because ERWA is a private, nonstock, nonprofit corporation [\[FN1\]](#) organized under KRS Chapter 273, [\[FN2\]](#) this office finds that ERWA cannot properly be characterized as a “public agency” within the meaning of [KRS 61.805\(2\)](#); accordingly, ERWA is not required to comply with provisions of the Open Meetings Act. No violation occurred.

As a means of remedying the alleged violation of the Open Meetings Act, Ms. Castleberry requested that David Ballinger, President, ensure that “all future meetings of the ERWA be conducted in compliance with [\[KRS\] 61.810](#) and thereby be open to the public except for the situations provided for in [\[KRS\] 61.810](#).” Having received no response to her written complaint dated April 23, 2009, Ms. Castleberry initiated this appeal by letter dated May 11, 2009, explaining that Mr. Ballinger prohibited her and “four other members of the Association from attending the regular monthly meeting of the ERWA Board of Directors.” Ms. Castleberry noted that said meeting “was held in the Livingston Homecoming Room which is public space owned by the Rockcastle County Fiscal Court. A notice that limited attendance to Board Members, Board Attorney, General Manager, and Auditor was posted on the meeting room door.” According to Ms. Castleberry, when she and the other individuals attempted to attend the meeting, “Mr. Ballinger called the Office of the Rockcastle County Sheriff who sent two deputies to escort the group from the meeting room.”

In support of her position that ERWA should be required to comply with provisions of the Open Meetings Act, Ms. Castleberry attached a copy of a memorandum from Jody Hughes, Executive Director, Kentucky Infrastructure Authority, to Richard J. Ornstein, Staff Attorney, Governor's Office for Local Development, regarding the “2006-2008 Infrastructure for Economic Development (IEDF) For Coal Producing Counties.” [\[FN3\]](#) Also included was a copy of the attached “Interlocal Cooperation Agreement” entered into by Western Rockcastle Water Association (Grantee) and ERWA (Assignee), on April 13, 2007. Each party is referred to as both a “public

governmental agency” and a “political subdivision of the Commonwealth of Kentucky” in the Agreement, which is purportedly governed by the “Interlocal Cooperation Act,” codified at [KRS 65.210-65.300](#). [FN4] In addition, Ms. Castleberry attached a copy of a letter to “Special District Board Member[s]” from the Rockcastle County Fiscal Court Office indicating that “3 documents titled *Your Duty Under the Law, Managing Government Records, and Proof of Receipt*,” materials distributed in accordance with [KRS 15.257](#) by the Attorney General to assist specific public officials in complying with the Open Meetings and Open Records Acts, were enclosed, the latter of which members were asked to sign and return to verify receipt. [FN5] Although Ms. Castleberry's reliance on the specific terminology employed in the referenced memorandum, and the quoted language from the Interlocal Cooperation Agreement entered into by WRWA and ERWA was entirely reasonable, none of that language is determinative on the facts presented.

*2 Upon receiving notification of Ms. Castleberry's appeal, which this office forwarded to him via facsimile on May 12, 2009, Jerry J. Cox, Attorney for ERWA, briefly responded on behalf of his client, asserting that ERWA “is a private, nonprofit corporation incorporated under KRS Chapter 273 and is therefore not subject to” the Open Meetings Act. According to Mr. Cox, the Agreement upon which Ms. Castleberry relied “does not determine the legal status of [ERWA].” Mr. Cox attached a copy of OAG 78-395 in support of his position that ERWA is not a “public agency” in the relevant sense, also relying on the unidentified “many, many others of similar note.” Because governing precedents confirm that private, nonstock, nonprofit corporations organized under Chapter 273, such as ERWA, are not public agencies within the meaning of [KRS 61.805\(2\)](#), this office concludes that ERWA is not required to comply with, and therefore cannot be said to have violated the Open Meetings Act notwithstanding the fact that ERWA improperly characterized itself as such and has been entrusted with expenditure of public funds.

For purposes of the Open Meetings Act, “public agency” is expansively defined at [KRS 61.805\(2\)](#) to include:

- (a) Every state or local government board, commission, and authority;
- (b) Every state or local legislative board, commission, and committee;
- (c) Every county and city governing body, council, school board, special district board, and municipal corporation;
- (d) Every state or local government agency, including the policy-making board of an institution of education, created by or pursuant to state or local statute, executive order, ordinance, resolution, or other legislative act;
- (e) Any body created by or pursuant to state or local statute, executive order, ordinance, resolution, or other legislative act in the legislative or executive branch of government;
- (f) Any entity when the majority of its governing body is appointed by a “public agency” as defined in paragraph (a), (b), (c), (d), (e), (g), or (h) of this subsection, a member or employee of a “public agency,” a state or local officer, or any combination thereof;
- (g) Any board, commission, committee, subcommittee, ad hoc committee, advisory committee, council, or agency, except for a committee of a hospital medical staff or a committee formed for the purpose of evaluating the qualifications of public agency employees, established, created, and controlled by a “public agency” as defined in paragraph (a), (b), (c), (d), (e), (f), or (h) of this subsection; and
- (h) Any interagency body of two (2) or more public agencies where each “public agency” is defined in paragraph (a), (b), (c), (d), (e), (f), or (g) of this subsection[.]

Despite the expansive language of [KRS 61.805\(2\)](#), and the legislative intent for the Act to be strictly construed so as to avoid unauthorized secret meetings of public agencies, the Attorney General has long recognized that a private, nonprofit corporation is not a public agency for purposes of the Open Meetings Act. In 03-OMD-037,

for example, this office held that the Kuttawa Relocation Foundation, Inc., formed as a private, nonprofit corporation “to aid in the plans of the city of Kuttawa for relocations which were made necessary by the construction of Barkley Dam and the formation of Lake Barkley,” was not a public agency within the meaning of [KRS 61.805\(2\)](#), and therefore was not subject to the requirements of the Open Meetings Act.

*3 Of particular significance in the instant appeal is OAG 78-395, upon which ERWA relied exclusively, and in which this office held that Harrison County Water Association, Inc., [\[FN6\]](#) which is organized under Chapter 273, “is a nonprofit, nonstock private corporation and as such it would not be subject to the Open Meetings Law, [KRS 61.805-61.850](#) Private, nonprofit corporations are not public agencies and need not comply with the Open Meetings Law. (See [KRS 273.233](#) as to the record keeping requirements of private corporations.)” Id., p. 1. In our view, OAG 78-395 is controlling on the facts presented. See also OAG 75-402 (community mental health board established by a nonprofit corporation is not a public agency); OAG 79-560 (ruralelectric cooperative, formed pursuant to KRS Chapter 279 as a nonprofit corporation, is not subject to the Open Meetings Act); OAG 81-266 (county hospital foundation, incorporated as a nonprofit corporation under KRS Chapter 273 for the purpose of local approval of loans for small businesses is not subject to the Open Meetings Act); 98-OMD-174 (a committee of a private, nonprofit professional association of physicians that oversees county ambulance service is not a public agency under the Open Meetings Act); 01-OMD-34 (Kentucky Bourbon Festival, Inc., a private, nonprofit corporation formed for the purpose of “directing the celebration... of all facets of the bourbon industry” is not a public agency within the scope of the Act). [\[FN7\]](#)

As evidenced by the foregoing line of decisions, the overwhelming weight of legal authority validates the position that ERWA takes. In light of this determination, further analysis is unwarranted. Because ERWA cannot properly be characterized as a “public agency” within the meaning of [KRS 61.805\(2\)](#), it follows that its Board is not required to comply with provisions of the Open Meetings Act.

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to [KRS 61.846\(4\)\(a\)](#). The Attorney General should be notified of any action in circuit court, but should not be named as a party in that action or in any subsequent proceedings.

Jack Conway
Attorney General

Michelle D. Harrison
Assistant Attorney General

[\[FN1\]](#). [KRS 273.161](#) defines “Nonprofit corporation” as “a corporation no part of the income or profit of which is distributable to its members, directors or officers[.]”

[\[FN2\]](#). Pursuant to [KRS 273.167](#):

Corporations may be organized under [KRS 273.161](#) to [273.390](#) for any lawful purpose or purposes, including, without being limited to, any one or more of the following purposes: charitable; benevolent; eleemosynary; educational; civic; patriotic; political; governmental; religious; social; recreational; fraternal; literary; cultural; athletic; scientific; agricultural; horticultural; animal husbandry; and professional, commercial, industrial or trade association; but labor unions, cooperative organizations, and organizations subject to any of the provisions of the insurance laws or banking laws of this state may not be organized under [KRS 273.161](#) to [273.390](#).

[FN3]. In the memorandum, Mr. Hughes indicated that “[p]ursuant to [KRS Sections 65.210 to 65.300](#), a Grantee, a public governmental agency, may assign responsibility of project administration via an Interlocal Cooperation Agreement, to a designated party, also a public governmental agency.” The IEDF Grant for “Project No. WX 21203553-169C-2007” was in the amount of \$120,000.00.

[FN4]. Having reviewed the relevant provisions of the Interlocal Cooperation Act, including the definition of “public agency” codified at [KRS 65.230](#) (“any political subdivision of this state, any agency of the state government or of the United States, a sheriff, any county or independent school district, and any political subdivision of another state... a state-supported or private institution of higher education and a county or independent public school district”), this office is compelled to note that water associations do not fall within the definition, and only “public agencies” may enter into agreements under the Act. See OAG 84-200, p. 2 (Agreements “cannot be extended to include nonpublic agencies” nor do they “grant governmental entities new or additional powers [or] authorize them to perform functions normally associated with private business”); OAG 77-524 (water association organized under Chapter 273 is not a political subdivision, agent of a political subdivision, or special district). Consequently, the Agreement between WRWA and ERWA is a legally binding contract, but cannot properly be characterized as an “Interlocal Cooperation Agreement.”

[FN5]. Inasmuch as board members of water associations, as opposed to board members of special districts, are not listed among the public officials to whom county judge executives are statutorily required to distribute said materials regarding the Open Records and Open Meetings Acts, it appears that the Office of the Rockcastle County Judge Executive/Fiscal Court, to its credit, erred on the side of caution in doing so. Although Ms. Castleberry's assumption regarding the implications of this action is understandable, particularly when viewed in light of the record as a whole, it has no legal significance in this context.

[FN6]. “From the name of the corporation,” this office assumed in OAG 78-395 that HCWA was “not a water district organized under the provisions of KRS Chapter 74,” and noted that such a water district “is subject to the provisions of both the Open Meetings and Open Records laws. A water district organized under [KRS 74.012](#) is not a private nonprofit corporation and is therefore a public agency. Cf. OAG 75-402.” OAG 78-395, p. 1.

[FN7]. At footnote 1 in 01-OMD-34, the Attorney General observed:

It should be noted that a private, nonprofit corporation may be a public agency for purposes of the Open Records Act, though it is not a public agency for purposes of the Open Meetings Act. See, e.g., 97-ORD-140 [and 02-ORD-222] (holding that Seven Counties, Inc. is a public agency within the meaning of [KRS 61.870](#) (1)(h) in that it derives more than 25% of its funding from state or local authorities). This dichotomy arises from the differences in the definition of “public agency” found in each of the Acts. OAG 76-648.

More specifically, the definition of “public agency” found at [KRS 61.805](#)(2) does not include “[a]ny body which derives at least twenty-five percent (25%) of its funds expended by it in the Commonwealth of Kentucky from state or local authority funds.” [KRS 61.870](#)(1)(h). Private, nonprofit corporations are public agencies for purposes of the Open Records Act only if they derive at least 25 percent of the funds they expend in the Commonwealth from state or local authorities.

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